Wayne Manufacturing Corporation *and* United Paperworkers International Union, AFL–CIO. Case 25–CA–22895

July 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On January 23, 1995, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel filed limited exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The General Counsel excepts to the judge's failure to find that the drug test administered by the Respondent on November 15, 1993, was discriminatorily motivated, and that the decisions of employees Scott Larsh and Damon Hill to resign from their employment with the Respondent after taking the drug test constituted constructive discharges. For the reasons explained below, we agree with the General Counsel that the Respondent's decision to administer the November 15, 1993 drug test was motivated by its employees' union activity and constitutes a violation of Section 8(a)(3) and (1).

Facts

On November 9, 1993,[2] nine employees met with the Union, and three were selected to be on the union organizing committee: Dan Nix, Bill Jennings and Scott Larsh. Each of these employees had a good work record. On November 14, Louis Dickerhoof, the president of the Respondent, asked employee Matt Dunn if he knew anything about a union. On November 15, Dickerhoof chose three employees, Scott Larsh, Damon Hill, and Brandon Heuer, to undergo the Company's first-ever random drug test. After undergoing the test, Hill quit that day, and Larsh quit the next day, November 16. Larsh testified that because he anticipated failing the drug test, he decided to quit because he would rather have a resignation on his record than a termination. Heuer passed the test and remains employed by the Respondent.

Also on November 16, the Respondent discriminatorily discharged the other two members of the union organizing committee, Dan Nix and Bill Jennings. In Jennings' exit interview, which took place about 2:30 p.m. on November 16, Louis Dickerhoof asked Jennings to name the union organizers, specifically the person who contacted the Union. Jennings stated that he only knew that he had not, and Dickerhoof replied, ''I have a feeling it is that damn Scott Larsh.''

Testimony by Nix, who was generally credited, indicates that at an employee meeting at about 4:15 p.m. on November 16, Louis Dickerhoof placed three or four rule books on a table and told employees that ''he had recently fired four people, none of which for any reason in the book.'' Two hours later, Nix was discharged.

The judge found that the ''chronology of events is such that Respondent's unlawful motive in discharging Jennings and Nix is crystal clear,'' and thus the discharges each constituted a violation of Section 8(a)(3) and (1) of the Act. The judge, however, found that the Respondent did not violate the Act for discharging Larsh, stating that

> even if Larsh was specifically picked out to be drug tested because he was a member of the union organizing committee, I nevertheless conclude that Respondent could discharge him because of drug use. See *Wright Line*, 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, Respondent didn't discharge Larsh, because Larsh voluntarily quit.

The judge noted that Hill was clearly randomly selected to undergo the drug test and resigned because he knew he would fail the test.

Analysis

We agree with the judge that the chronology of events establishes the essential elements of discrimination, but unlike the judge, we find that these elements apply to the Respondent's decision to administer the drug test, as well as to the discharges of Jennings and Nix. In so finding, we note that the judge has misapplied the test in *Wright Line*. The correct test requires that after the General Counsel has established a prima facie case, the burden shifts to the Respondent

[1] No exceptions were filed to the judge's findings that the Respondent discriminatorily discharged employees Bill Jennings and Dan Nix in violation of Sec. 8(a)(3) and that the Respondent violated Sec. 8(a)(1) by interrogating an employee about his union activities and the activities of fellow employees, telling an employee that he could save his job if he told the Respondent about the union activities of other employees, threatening an employee that it might go out of business if a union were selected, and telling an employee that the selection of a union would be futile.

The judge inadvertently omitted from his Conclusions of Law and his recommended Order and notice any reference to his finding that the Respondent violated Sec. 8(a)(1) by telling an employee that the selection of a union would be futile. We have modified the Conclusions of Law, Order, and notice to include this violation.

[2] All dates are in 1993 unless otherwise noted.

to demonstrate that the decision would have been the same even absent the protected activity.

In the present case, we find that the General Counsel has established that the Respondent knew of the employees' union activity prior to administering the drug test, had animus toward the Union, administered the first random drug test in its history within 1 week of the Union's first organizational meeting with its employees, and also within that week terminated or caused the resignation of the three employees named to the union organizing committee. In addition, the day after Larsh was required to undergo the drug test, Dickerhoof told employee Jennings that he thought it was ''that damn Scott Larsh'' who had contacted the Union, and announced at an employee meeting later that same day that ''he had recently fired four people, none of which for any reason in the rule book.'' This evidence is sufficient to establish a prima facie case of a discriminatory motive for the decision to give a random drug test.

The Respondent maintains that it would have made the same decision even absent the union activity of its employees. The Respondent asserts that the decision to administer the drug test was motivated solely by the Respondent's concerns about quality control problems, which had intensified in the 4 months prior to the administration of the drug test. The judge found that the Respondent did present some evidence to establish that its quality control concerns were legitimate, and that there was some improvement in quality after the random drug test was administered.

The judge failed to take into account, however, that the Respondent's President Louis Dickerhoof testified that the Respondent's quality control problems had been around as long as the Respondent had been in business, and that around the time of the drug testing, other steps had been taken to improve the quality of its products, including the hiring of a quality control inspector. Further, we note that even during the 4 months prior to the random drug test, the Respondent never indicated that it suspected drug use as a possible reason for these problems.

In addition, the Respondent contends that the November 15 drug test was consistent with its strict antidrug policy that permitted it to randomly test employees for drug use and to discharge them if they tested positive. The Respondent pointed to its policy of testing employment applicants for drug use and its termination of another employee after discovering his drug use. The judge agreed, and found that on only one occasion did the Respondent manifest anything other than a ''zero tolerance'' for drug use.

We note that although the Respondent did on one occasion respond to a specific report of an employee's drug use by administering a drug test and then firing the employee for testing positive, the Respondent had never, prior to the union campaign, utilized a random drug test in any circumstances. Further, the fact that the Respondent was willing to hire two brothers who failed the prehire drug test indicates that the Respondent did not in fact have a policy of ''zero-tolerance'' for drug use. Under these circumstances, we find that the Respondent has failed to demonstrate that the decision to administer the drug test would have been made even absent the employees' union activity. Rather, we find that the drug test was administered in order to discourage the employees' union activities in violation of Section 8(a)(3) and (1).[3]

With respect to Larsh's resignation, there is no dispute that he quit because he anticipated failing the drug test. It follows, then, that if the unlawfully motivated test had not been administered, Larsh would still be employed by the Respondent. Accordingly, in order to restore the status quo ante, we shall order that Larsh be returned to his former job or a substantially equivalent position.

We will not, however, order the Respondent to reinstate Damon Hill. In this regard, we note that Hill did not testify at the trial and that there is no evidence in the record as to why Hill resigned.[4] Accordingly, in the absence of such evidence, we cannot make a finding that the administration of the unlawful drug test caused Hill to quit, and therefore we adopt the judge's dismissal of this allegation.

AMENDED REMEDY

Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by its unlawful administration of a drug test and by discharging employees Bill Jennings and Dan Nix, we shall order the Respondent to offer to Scott Larsh, Bill Jennings, and Dan Nix immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful drug tests, discharges and resignation, and to notify the discriminatees in writing that this has been done.

[3] *CBF, Inc.*, 314 NLRB 1064, 1075–1076 (1994).

[4] The only evidence regarding Hill's possible motivation for resigning is Larsh's testimony that Hill ''quit when we came back from the drug testing.'' This testimony is insufficient to establish a causal connection between the drug test and Hill's decision to resign.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 4.

''4. The Respondent violated Section 8(a)(1) of the Act when it interrogated Bill Jennings about his union activity and that of his fellow employees, told Jennings that he could save his job if he told the Respondent about the union activity of his fellow employees, threatened that if a union came in the Respondent might shut down, and that it would be futile for the employees to select a union to represent them.''

2. Substitute the following for Conclusion of Law 5.

''5. The Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Bill Jennings and Dan Nix because they engaged in union activity, and by administering a random drug test that was motivated by its employees' union activity.''

ORDER

The National Labor Relations Board orders that the Respondent, Wayne Manufacturing Corporation, Laotto, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activity or that of their fellow employees or telling employees that they can save their jobs if they tell the Respondent about the union activity of other employees.

(b) Threatening employees that if a union is selected the Respondent may go out of business.

(c) Telling employees that it would be futile for them to select a union to represent them.

(d) Discharging employees because they engaged in union activity.

(e) Administering random drug tests motivated by employees' union activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Bill Jennings, Dan Nix, and Scott Larsh immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of the decision.

(b) Remove from its files any reference to the unlawful drug tests, discharges and resignation, and notify the employees in writing that this has been done and that the drug tests, discharges and resignation will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Laotto, Indiana, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their union activity or that of their fellow employees or tell employees that they can save their jobs if they tell us about the union activity of other employees.

WE WILL NOT threaten employees that if a union is selected we may go out of business.

WE WILL NOT tell employees that it would be futile for them to select a union to represent them.

WE WILL NOT discharge employees because they engaged in union activity.

WE WILL NOT administer random drug tests motivated by employees' union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Bill Jennings, Dan Nix, and Scott Larsh immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge or resignation, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his drug test, discharge or resignation, and that the drug test, discharge or resignation will not be used against him in any way.

WAYNE MANUFACTURING CORPORATION

Walter Steele, Esq., for the General Counsel.
R. Scott Summers, Esq. and *Stephen D. LePage, Esq*., of Greenwood, Indiana, for the Respondent.
Ted Sautter, International Organizer, of Nashville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On November 23, 1993, the charge in Case 25–CA–22895 was filed by United Paperworkers International Union, AFL–CIO (the Union) against Wayne Manufacturing Corporation (Respondent).

On January 31, 1994, the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint, which alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) when it unlawfully interrogated and threatened employees and when it discharged four employees.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Ft. Wayne, Indiana, on August 15, 16, and 17, 1994.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent, a corporation, with an office and place of business in Laotto, Indiana, has been engaged in the manufacture of metal stamping products.

During the 12-month period ending November 1, 1993, Respondent, in conducting its business operations described above, purchased and received at its Laotto, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana.

At all material times Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

Respondent has approximately 65 employees. Next door to its facility is Wayne Tool & Design with approximately 15 employees. Lewis Dickerhoof is president of both companies. He is also one of the four owners of both companies. Lewis Dickerhoof is the general manager of Wayne Tool & Design and his nephew, Lamont Dickerhoof, is the general manager of Respondent. The final say on key matters at both companies is Lewis Dickerhoof. Neither the employees at Respondent nor at Wayne Tool & Design are represented by a union. Basically Wayne Tool & Design makes the dies, jigs, and fixtures that are supplied to Respondent which uses them to produce metal stampings which it supplies to its customers. Respondent's biggest customer is Dana Corporation which accounts for approximately 70 percent of Respondent's production.

In October 1993 some of Respondent's employees started talking among themselves about bringing in a union to represent them. Among the reasons for this talk was that the employees were working 7 days a week and did not like that large amount of compulsory overtime and also were concerned about their job security as a result of two employees recently being discharged. On November 9, 1993, a group of nine employees met at the union hall with International Organizer Ted Sautter. A union organizing committee was selected. It was composed of three employees, Bill Jennings, Dan Nix, and Scott Larsh. It was agreed at the meeting that Sautter would prepare a letter for the union organizing committee to present to Respondent. It was agreed that the letter would be presented to Respondent on Tuesday, November 16, 1993, and the letter would contain the names of the three employees who were the members of the union organizing committee. Before the letter could be delivered all three members of the union organizing committee and one other employee, Damon Hill, were no longer working for Respondent. Bill Jennings and Dan Nix were fired on November 16, 1993, and Scott Larsh resigned on November 16, 1993, when he felt he had failed an unprecedented random drug test conducted by Respondent on November 15, 1993.

It is alleged that Respondent violated the Act when it discharged Bill Jennings and Dan Nix and when it caused Scott Larsh and Damon Hill to resign. It is also alleged that Respondent, by Lewis Dickerhoof, violated Section 8(a)(1) of the Act in statements made to then employee Chris Dunn and in statements made to Bill Jennings at Jennings' exit interview.

Respondent claims that it knew nothing about the union organizing effort at the time it fired Jennings and Nix and that it fired Jennings and Nix because of poor job performance and also insubordination in Nix's case. Further, because of quality control problems Respondent decided to conduct

a random drug test which it claims it had authority to do in its rules and that Larsh, Hill, and an employee named Brandon Heuer were randomly selected and Larsh and Hill quit before the results were back because they knew they had flunked the test. Lastly, Lewis Dickerhoof denies making the unlawful statements attributed to him by Matt Dunn and Bill Jennings.

B. *Respondent Had Knowledge of Union Activity*

If Respondent knew nothing of the union organizing effort it obviously could not have fired or caused the discharge of the alleged discriminatees because of their union organizing efforts as alleged.

Matt Dunn, a young man, testified before me and was very credible. Dunn worked for Wayne Tool & Design for over 2 years. Wayne Tool & Design is housed in a building located next to Respondent's facility. Employees could eat lunch at either facility and Dunn did and as a result knew employees of Respondent as well as employees of Wayne Tool & Design.

On Sunday, November 14, 1993, Lewis Dickerhoof asked Chris Dunn at work if he had heard anything about a union. Dunn said no and Lewis Dickerhoof then commented that he (Dickerhoof) didn't think Dunn would have heard about it because he worked next door.

On the morning of the day Dunn testified before me, i.e., August 15, 1994, according to Dunn, Dickerhoof told him that he (Dickerhoof) was disappointed to see that Dunn was at the hearing.

Dunn was very credible in my opinion. His demeanor on the stand was one of a truthful young man. Before the hearing ended Dunn voluntarily quit his employment with Respondent and expressed anger at Lewis Dickerhoof to Dickerhoof's son Ron, who is also an employee of Respondent.

Dickerhoof, who did not impress me as an honest witness, denied that he asked Dunn anything about the Union.

Dickerhoof's questioning of Dunn about union activity was unlawful interrogation in violation of Section 8(a)(1) of the Act. And, significantly, Dickerhoof's interrogation of Dunn proves that Dickerhoof suspected union activity at Respondent's facility.[1]

C. *The Random Drug Test and Termination of Employment of Scott Larsh and Damon Hill*

On one occasion in 1992 Respondent became aware of allegations that employee Jason Knause was using drugs. He was subjected to a drug test which he failed, Knause admitted he did use drugs, and he was fired. This was the only drug test of an employee in the 12 years of Respondent's existence and it was not a random drug test.

Respondent for several years, however, had a policy of conducting prehire drug tests. If an applicant for employment flunked the test he or she would not be hired. On only one occasion did Respondent manifest anything other than zero tolerance for drug use and that was when Lewis Dickerhoof was willing to hire two employees who were brothers, who flunked the prehire drug test, but told Lewis Dickerhoof that they were going to quit using marijuana. He hired them even though they failed the drug test, but both brothers quit shortly thereafter.

Just 6 days after nine employees met with the Union regarding a union organizing campaign and on the day after Lewis Dickerhoof asked employee Matt Dunn if he knew anything about a union organizing campaign at Respondent's facility Lewis Dickerhoof decided to conduct the first ever random drug test among his employees. According to Lewis Dickerhoof's son, Ron Dickerhoof, the employee numbers of three employees were drawn from a hat. The numbers were then matched with the list of employees and those three employees were drug tested on Monday, November 15, 1993. Scott Larsh, a member of the union organizing committee with an outstanding work record, was selected as well as two other employees, Damon Hill and Brandon Heuer. Hill had no involvement whatsoever with the Union, but Heuer was at the union meeting on November 9, 1993. Larsh and Hill knew they would flunk the test because of recent marijuana use and resigned from Respondent's employ the day after the test rather than be fired.

Respondent claims it ordered the random drug test which was permitted by its rules (G.C. Exh. 4, p. 13, rule 20) but which it had never done before because of its perception of quality control problems possibly occasioned by employee drug use. Respondent did present evidence to establish some quality control problems prior to the random drug test. See Respondent's Exhibits 1 through 11. And, indeed, there was evidence presented by Respondent that after the random drug test quality control improved.

Hill left town and was not a witness at the hearing before me. Larsh did testify before me. He admitted marijuana drug use within the week or so prior to the random drug test and he further admitted that he had used marijuana while employed by Respondent while on the job some time in the past. He had worked for Respondent for 4-1/2 years before he quit.

Even if Larsh was specifically picked out to be drug tested because he was a member of the union organizing committee. I nevertheless conclude that Respondent could discharge him because of drug use. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, Respondent didn't discharge Larsh because Larsh voluntarily quit. Hill was clearly randomly selected to be drug tested and he quit because he knew he would flunk the test because of recent marijuana use. The third person tested, Brandon Heuer, tested negative for drug use and was still employed by Respondent at the time of the hearing before me.

Respondent did not violate the Act when it drug tested Scott Larsh and Damon Hill and thereby caused or precipitated their resignations from Respondent's employ.

Needless to say the military and professional sports randomly drug test and don't usually fire individuals, i.e., service members or athletes, for a first offense but an employer is entitled to have a zero tolerance policy for drugs and can be harsher in punishing employees who use drugs than the military or professional sports without running afoul of the law.

[1] Because of hearsay problems, I give no weight whatever to statements attributed to employee Chris Dennen by some of the General Counsel's witnesses.

D. *The Discharge of Bill Jennings*

Bill Jennings began his employ with Wayne Tool & Design in October 1983. He went full time and transferred to Respondent in February 1984. He was either the second or third most senior employee of Respondent when fired on November 16, 1993.

On November 9, 1993, Jennings and eight other employees met at the union hall with the union representative. Jennings was selected, along with Dan Nix and Scott Larsh, to be on the union organizing committee. In addition to this union activity Jennings had spoken about the Union with five to seven different employees at work during breaks and when away from work.

As has been established by the credited testimony of Matt Dunn Respondent was aware of union activity at Respondent's facility by Sunday, November 14, 1993. On November 16, 1993, Jennings was fired allegedly for being late twice on filing quarterly reports and for being a poor worker for many years.

Respondent claimed that Jennings had a poor work ethic and talked too much with fellow employees and spent too much time on the phone. But I credit Jennings that management never told him this. Further, there were no written reprimands or any other discipline of any kind in Jennings' personnel file. Jennings served in the very important job of inspector, checking on the quality of other employees' work and had received raises throughout his career with Respondent and was making top dollar at the time he was fired. He received his last raise earlier in the very month he was fired. Jennings was an outstanding employee until he committed the unforgivable sin, in Respondent's eyes, of trying to organize Respondent's employees. Respondent's claim that Jennings was a poor worker for years is ludicrous. He was one of Respondent's most senior employees with an unblemished record who worked at top pay in the critical inspector's job.

It is also claimed that Jennings filed two reports late. Dana Corporation is the biggest customer of Respondent. Indeed Respondent does 70 percent of its work for Dana Corporation. Dana Corporation in turn provides product to, among other entities, Ford and Chrysler. Lamont Dickerhoof, Lewis Dickerhoof's nephew and the general manager of Respondent, files quarterly reports known as SPC reports. The report for the quarter ending June 30 is due July 31 and the quarterly report ending September 30 is due October 31. Suffice it to say Respondent claims the June 1993 quarterly report was filed later than July 31, 1993, and the September 30, 1993, quarterly report was not filed until November 1993. Dana Corporation verified the fact that the quarterly reports were indeed filed untimely. Respondent, through Lamont Dickerhoof, lays the blame at the feet of Bill Jennings.

However, the quarterly reports are submitted to Dana not by Jennings but by Lamont Dickerhoof. Jennings merely supplies, in handwritten form, the data from which Lamont Dickerhoof then causes a typed report to be prepared.

Jennings impressed me when he was on the stand as an honest man. He credibly testified that he turned in the data necessary to prepare the quarterly reports in handwritten form to Lamont Dickerhoof in a timely fashion and any delay in the submission of the typed quarterly reports to Dana was the fault of someone other than him. I believe Jennings because he was credible on the stand and because Lamont Dickerhoof was not as credible. The bottom line is Respondent was seeking to justify the discharge of Jennings because of his union organizing activity and fabricated the story that Jennings was responsible for the reports being late. I observe further that a semiannual report covering a period ending June 30, 1993, was timely filed and the same data Jennings gathered for the semiannual report was the data needed for the June 1993 quarterly report and since that data was timely submitted by Jennings for the semiannual report it seems likely that the data for the June 1993 quarterly report was likewise timely submitted by Jennings.

But even if Jennings was responsible for the late filed quarterly report it is interesting that he was not so much as reprimanded—orally or in writing—for the first incident (i.e., the quarter ending June 30) but is fired—the capital punishment of the workplace—for the second incident (i.e., the quarter ending September 30). Indeed, Jennings received a pay raise in early November 1993. The record could not be clearer that Respondent fired Bill Jennings because of his activity on behalf of the Union.

On the day he was fired Jennings was interrogated by Lewis Dickerhoof. The following testimony was elicited from Jennings by the General Counsel concerning this interrogation:

> Now, you were discharged on November 16th, is that correct?
>
> A. Yes.
>
> Q. Now, I want you to tell us in detail, as completely as possible, what happened on the day of your discharge?
>
> A. Uh, at 2:30 break, we took our 2:30 break. I was sitting there.
>
> And the buzzer went off at 2:40 to go back off of break, back to work.
>
> I got up from the table and was walking to my office.
>
> Monty and Lewie were standing out in front of the front office door.
>
> And when I came around the corner, they stopped talking and Lewie motioned and said, ''Bill, follow me.''
>
> He then took me over to Wayne Tool and Design, into his office and told me to sit down. He said, ''I have some bad news, terrible news for you. We're firing you today.''
>
> I said, ''Why?''
>
> And he said, ''Because you're causing too many problems with the Company.''
>
> And I asked him, ''Like what?''
>
> And he said, ''Well, you're an instigator. And you are fueling the fires against the Company.''
>
> And he —
>
> Q. He said fueling the fires against the Company?
>
> A. Yes.
>
> Q. And did he explain to you what he meant by that?
>
> A. No. I asked him eventually. And he said that he didn't have to tell me.
>
> Q. Uh-huh. And what happened next then?
>
> A. He told me that I would be stupid and naive if I didn't know what he was taking about, and that he had employees that had come forward and verified that

over the past four years, that I had instigated and fueled the fires against the Company.

And I was like, ''What?''

And he said, ''There—that he didn't have to tell me.'' He said that he wasn't going to tell me, because he didn't have to.

And then I said, ''Well, I don't know what you're referring to, as far as the past four years. But are you referring to the rumors of the Union?''

And he said, ''You said. I didn't. Just remember that you said it.''

And then he went on to say that he wasn't against Unions, but in a small place, it wouldn't work because it took the competitive edge off of quoting the jobs, the prices on the jobs.

And then he said that he would be willing to sit there and listen if I wanted to give him the names of the guys who went down to the Union hall with me.

And I asked him, ''What good would that do?''

And he said, ''Well, it could possibly save your job.''

And I said, ''Oh, yeah? And what would it mean to the other guys?''

And he said, ''Well, I haven't decided that yet.''

And I said, ''Well, no. I'm not going to tell you.''

And then he said that he was going to get to the bottom of it and changes would be made.

He gave me another chance to—

He says, ''I want to know who went down to the Union hall with you.''

And as he asked me that, he grabbed a piece of paper and a pencil, to write it down.

And I had told him no, that I wasn't going to tell him.

And he said that if it came to a vote that day, that 90 per cent would vote it down, because they were all happy with their jobs.

And then he said that—

Q. Take your time.

A. Let's see, what else did he say?

Q. You indicated that he asked for names, is that correct?

A. That's correct.

Q. All right. And how many times did he do that?

A. He asked three times.

Q. Okay.

A. He had said a few more things about the Union in between.

I was trying to think of all the things that he had actually said. But it is kind of slipping from me.

But then, anyway, he said, ''I'm going to give you one more chance to give me the names of the guys that went down and talked to the Union.''

And I told him, ''No. I'm not going to tell you.''

And then he said, ''Well, then my decision stands. And I am going to just fire you today.''

Q. Okay. And did he mention—

Did he mention whether or not you had indeed contacted the Union?

A. No. He asked, ''Who contacted the Union?''

And I said, ''All I know is that it wasn't me.''

And he said that he didn't think that I would go out on a limb on my own like that, that he felt that he knew who did.

He said, ''I have a feeling that it is that damn Scott Larsh.''

Q. And what else, if anything, did he say?

A. (No response.)

Q. Did he say anything more about Mr. Larsh? (Long pause.)

A. I really can't remember.

Q. Okay.

A. But then after he—

The last time he had said—had wanted to know the names of the guys that went down and talked to the Union, and I told him no, he said that he would then escort me over next door. I wasn't to talk or see anyone in the plant, that I was to clear out my stuff, and then he would escort me back to my car and that then I was to leave.

He said that I could pick up my check on Friday, by entering through the front office doors, and not seeing or talking to anyone in the plant at that time either.

And he said that Jenny would mail my last paycheck to me.

Q. All right. Now, let me ask you this, Mr. Jennings, in your conversation where Mr. Dickerhoof was talking about the Union, did he ever mention any specific number of people?

A. He said that he knew that it would take three guys to start the Union, to get one started, organized and get one going.

Q. Uh-huh.

A. And that—so we had to have that, in order to be doing what we were doing.

Q. Uh-huh.

A. And then that is when I said—

That's when he asked who contacted them initially.

And I said, ''That I wasn't the one who contacted them.''

Q. All right. And now did he ask for the names of the guys that contacted them?

A. Well, yeah. But I told him that I wouldn't give them to him.

Q. Okay.

JUDGE LINSKY: Now, this conversation, you and Lewis Dickerhoof were the only two parties to it?

THE WITNESS: Yes.

JUDGE LINSKY: All right.

(By Mr. Steel):

Q. Was there anything—

Did Mr. Dickerhoof say anything about contracts during your conversation?

A. Yeah. He said that even if the Union would come in, that they wouldn't bargain on any contracts, that the mandatory overtime that we were working was a necessity.

And he said that they just would not listen or deal with them at all.

And at the first sign of a faltering month, that they would close the doors. [Tr. 292–299.]

Insofar as Lewis Dickerhoof and Bill Jennings contradict one another, I credit Jennings. Jennings was an impressive

witness. Lewis Dickerhoof was not. It is clear to me beyond all doubt that Respondent discharged Bill Jennings because of his activity on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act. In addition, Respondent, by Lewis Dickerhoof, violated Section 8(a)(1) of the Act when, in the exit interview with Bill Jennings, Dickerhoof interrogated Jennings about Jennings' union activity and that of his fellow employees, when he told Jennings he may not be discharged if he disclosed to Respondent the union activity of his fellow employees, when he threatened Jennings with plant closure if a union got in, and when he informed Jennings that it would be futile for the employees to select a union to represent them.

E. *The Discharge of Dan Nix*

Dan Nix began his employment with Respondent on April 15, 1992. He was a press operator on the first shift and received normal raises and no discipline.

In late August 1993 General Foreman Fred DeArmond asked Nix if he wanted to go to the second shift as a die setter. Nix said okay and later met with Lewis Dickerhoof. Dickerhoof offered the die setter job on the second shift to Nix and told Nix that if it didn't work out Nix could go back to his press operator's job.

Nix was trained as a die setter by Ron Skinner on the first shift and then transferred to the second shift under Foreman Rick Saylor. Skinner is still employed by Respondent and is well thought of by Lewis Dickerhoof who testified that Skinner will always have a job with Respondent and Dickerhoof thinks of Skinner as a son. Skinner testified for the General Counsel that Nix would be a competent die setter but would initially be slow like all new die setters. Saylor was disappointed was the speed with which Nix did the die setting and complained to Nix that he was too slow.

On November 9, 1993, as noted above, nine employees met with Union Organizer Ted Sautter. At this time Nix had been a die setter on the second shift for approximately 1 week. Nix was not at the union meeting on November 9, 1993, but was selected by his fellow employees nevertheless to be part of the three-person union organizing committee. The next day Bill Jennings asked Nix if he would serve on the union organizing committee and Nix said he would.

As a die setter Nix filled out a job card on which he would note by a code number what he was working on at certain periods. He testified and was corroborated by Ron Skinner, who as noted is still employed by Respondent, that Ron Skinner told Nix to put a ''500'' supervisor code on the job card if he was helping another employee with his press, for example, even though Nix was not a supervisor. Nix did as instructed until his foreman on the second shift Rick Saylor told him to no longer use the ''500'' code. Once told not to use the ''500'' code Nix did not use it.

On November 16, 1993, Nix was discharged by Respondent for being a poor die setter, for being insubordinate to Foreman Rick Saylor, for having a bad attitude, and to a lesser extent for alleged improper use of the ''500'' supervisor code. But the record at the hearing was so clear that Nix used the code because he was told to do so by the person who trained him (Ron Skinner) and stopped using it on being told he should not use that code that Respondent cannot with a straight face claim that it relied on this.[2]

Nix denied he was insubordinate to Saylor but does admit that Saylor told him he was too slow. I believe Nix's testimony in its entirety. He impressed me as a very honest witness. Insofar as Rick Saylor contradicts Nix and testifies to some kind of insubordination from Nix to Saylor, I credit Nix. Saylor, although he no longer works for Respondent, apparently didn't like Nix because Nix was opposed to Saylor being named a foreman.

Lewis Dickerhoof concedes that he told Nix that if things didn't work out for Nix as a die setter on the second shift that Nix could return to the first-shift press operator's job but claims he meant that only if Nix was a total bust as a die setter could he return to his old job and if Nix just was not all that good as a die setter he couldn't return to his old job but would be fired. Dickerhoof's position is ludicrous beyond belief. It appears Nix may not have been that fast a die setter and pursuant to Dickerhoof's promise to Nix, Nix should have been returned his old job rather than fired.

Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Dan Nix.

F. *Conclusion*

It is clear looking at the timing of events that Dan Nix and Bill Jennings were fired because of their activity on behalf of the Union. The chronology of events is such that Respondent's unlawful motive in discharging Jennings and Nix is crystal clear:

1. Jennings begins his employment with Respondent in February 1984. He is the third most senior employee by November 1993. During his years of service he is never disciplined.

2. Nix begins his employment with Respondent in April 1992. He is selected to be trained as a die setter because of his competence as a press operator. He is told that if things don't work out as a die setter he can return to his old job.

3. On November 9, 1993, nine employees meet with the Union. Bill Jennings, Dan Nix, and Scott Larsh are selected to be on the union organizing committee.

4. On November 14, 1993, Lewis Dickerhoof makes it clear to employee Matt Dunn that he knows a union organizing drive is under way.

5. Within days one of the three members of the union organizing committee, Scott Larsh, quits when subjected to an unprecedented random drug test because he knows he will flunk the test and would rather have a quit rather than a discharge on his record.

6. On November 16, 1993, the other two members of the union organizing committee, Bill Jennings and Dan Nix, are discharged on trumped-up charges.

REMEDY

In this case an appropriate remedy would be an order to Respondent to cease and desist from its unlawful conduct, re-

[2] During the investigation preceding issuance of the complaint, certain documents were turned over to the Region by Respondent. Copies of those same records were introduced by Respondent at the hearing before me. It appears that some alteration of one of the documents was made by someone whose identity is unknown to me to reflect that Nix used the ''500'' supervisor code when he didn't. The doctored records was put in evidence by the Respondent.

instate and make whole Bill Jennings and Dan Nix, and post an appropriate notice.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it unlawfully interrogated Matt Dunn about the union activity of Respondent's employees.

4. Respondent violated Section 8(a)(1) of the Act when it interrogated Bill Jennings about his union activity and that of his fellow employees, told Jennings that he could save his job if he told Respondent about the union activity of his fellow employees, and threatened that if a union came in the Respondent might shut down.

5. Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Bill Jennings and Dan Nix because they engaged in protected concerted activity.

6. Respondent did not violate the Act in any other way.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]